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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

THE MEAD CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether classification rulings issued by the Customs Service are entitled to deference in determining the proper tariff classification of imported goods.

2. Whether the Customs Service reasonably interpreted the statutory phrase "diaries, notebooks and address books, bound" in Subheading 4820.10.20 of the Harmonized Tariff Schedule of the United States to include the spiral-bound and ring-bound day planners imported by respondent.

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PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-16a) is reported at 185 F.3d 1304. The opinion of the Court of International Trade (App., *infra*, 19a-27a) is reported at 17 F. Supp. 2d 1004. The Customs Service ruling (App., *infra*, 28a-47a) that applies to this case is cited as HQ No. 955937 and is reported unofficially at 1994 WL 712863 (Customs).

JURISDICTION

The judgment of the court of appeals was entered on July 28, 1999. A petition for rehearing was denied on November 1, 1999 (App., *infra*, 17a). On January 19, 2000, the Chief Justice extended the time for filing a petition for a writ of certiorari to March 1, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. General Note 20 of the Harmonized Tariff Schedules of the United States, 19 U.S.C. 1202 (Supp. I 1995), provides in relevant part:

> The Secretary of the Treasury is hereby authorized to issue rules and regulations governing the admission of articles under the provisions of the tariff schedules. * * *

2. 19 U.S.C. 1502(a) provides in relevant part:

> The Secretary of the Treasury shall establish and promulgate such rules and regulations not inconsistent with the law (including regulations establishing procedures for the issuance of binding rulings prior to the entry of the merchandise concerned), and may disseminate such information as may be necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon at the various ports of entry. * * *

3. 19 U.S.C. 1624 provides:

> In addition to the specific powers conferred by this chapter the Secretary of the Treasury is authorized to make such rules and regulations as

> may be necessary to carry out the provisions of this chapter.

4. For the period that this case involves, Subheading 4820.10.20 of the Harmonized Tariff Schedules of the United States, 19 U.S.C. 1202 (Supp. I 1995), provides a rate of duty of 3.2% for:

> Diaries, notebooks and address books, bound; memorandum pads, letter pads and similar articles
> * * *

5. 19 C.F.R. 177.9(a) provides in relevant part:

> *Effect of ruling letters generally.* A ruling letter issued by the Customs Service under the provisions of this part represents the official position of the Customs Service with respect to the particular transaction or issue described therein and is binding on all Customs Service personnel in accordance with the provisions of this section until modified or revoked. In the absence of a change of practice or other modification or revocation which affects the principle of the ruling set forth in the ruling letter, that principle may be cited as authority in the disposition of transactions involving the same circumstances. Generally, a ruling letter is effective on the date it is issued and may be applied to all entries which are unliquidated, or other transactions with respect to which the Customs Service has not taken final action on that date. * * *

6. 19 C.F.R. 177.10(a) provides in relevant part:

> *Generally.* Within 120 days after issuing any precedential decision under the Tariff Act of 1930, as amended, relating to any Customs transaction (prospective, current, or completed), the Customs Service shall publish the decision in the Customs

Bulletin or otherwise make it available for public inspection. For purposes of this paragraph a precedential decision includes any ruling letter, internal advice memorandum, or protest review decision. * * *

STATEMENT

This case concerns whether judicial deference is owed to the tariff classification rulings issued by the Customs Service under 19 U.S.C. 1502(a). That statute authorizes the Secretary of the Treasury to adopt "rules and regulations" providing for the issuance of such "binding rulings prior to the entry of the merchandise" as may "be necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon * * * ." 19 U.S.C. 1502(a). Pursuant to that authority, the Secretary has provided for the issuance of tariff classification rulings by the Customs Service which are "binding on all Customs Service personnel" and which, "[i]n the absence of a change of practice or other modification or revocation which affects the principle of the ruling set forth in the ruling letter, * * * may be cited as authority in the disposition of transactions involving the same circumstances." 19 C.F.R. 177.9(a). In addition, the Customs Service is authorized to issue classification rulings in connection with specific merchandise already imported, 19 C.F.R. 177.11(a), and to issue decisions on protests from customs classification determinations, 19 U.S.C. 1515(a). The classification determinations set forth in such rulings and protest review decisions are also "precedential" in effect. 19 C.F.R. 177.10(a).

In the present case, the Federal Circuit held that these tariff classification rulings of the Customs Service

are to be given no judicial deference, and are instead to be disregarded utterly in interpreting the customs provisions. App., *infra*, 6a-7a. That holding warrants this Court's review.

1. Respondent imports "daily planners," which are "loose-leaf books containing calendars, room for daily notes, telephone numbers, addresses and notepads. This sort of product is probably best known under the trademark of Filofax." App., *infra*, 19a. Under Subheading 4820.10.20 of the Harmonized Tariff Schedule of the United States (HTSUS), 19 U.S.C. 1202 (Supp. I 1995), if such items are properly classified as "bound" "diaries," they are subject to an import duty of 3.2% of their value.[1] If, however, these items are not "bound" or are not "diaries," they would then fall under Subheading 4820.10.40 of the HTSUS as "[o]ther" items for which no duty applies. App., *infra*, 20a-21a, 24a.

In 1993, when respondent imported its daily planners into the United States, they were classified as "bound" "diaries" to which the 3.2% duty applied. Respondent filed an administrative protest of that classification. On October 21, 1994, the Customs Service issued a detailed denial of that protest in Headquarters Ruling (HQ) No. 955937, 1994 WL 712863 (Customs). App., *infra*, 28a-47a. That ruling noted that the issue presented by respondent "has been addressed in several rulings by this office" (*id.* at 31a-32a (citing, *e.g.*, Headquarters Ruling Letters (HRL) Nos. 955636, 1994 WL 220733 (Customs Apr. 6, 1994) and 955637, 1994 WL 220734 (Customs Apr. 6, 1994))):

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[1] The rate of duty on these items has been reduced since this case arose. It is currently 1.6%. HSTUS Subheading 4820.10.20, 19 U.S.C. 1202 (Supp. IV 1998).

> In these rulings this office has consistently determined that articles similar in design and/or function to the instant merchandise are classifiable as diaries. The rationale for this determination was based on lexicographic sources, as well as extrinsic evidence of how these types of articles are treated in the trade and commerce of the United States.

The agency noted that the text of Subheading 4820.10, "the common dictionary definition of 'diary', and past Customs rulings" all reflect that such daily planners are properly "classifiable as a diary." App., *infra*, 32a.

The Customs Service explained that the daily planners imported by respondent "fit squarely" within one of the definitions of the word "diary" contained in the *Oxford English Dictionary*—as "[a] book prepared for keeping a daily record, or having spaces with printed dates for daily memoranda and jottings." App., *infra*, 32a-33a. The Service rejected respondent's assertion that the agency should base its classification of such merchandise solely on the first enumerated definition of "diary" in one dictionary as "[a] daily record of events or transactions, a journal." *Id.* at 33a. The agency explained that "[m]any words have several definitions and Customs may consider any or all of them when making a classification determination." *Ibid.* The agency concluded that the broader definition of the term "diary" adopted in its rulings "reflects the common and commercial identity of these items in the marketplace"—a fact evidenced by the common usage of the term "desk diary" to describe the imported merchandise. *Id.* at 34a.

Noting that customs provisions commonly incorporate prevailing commercial usages, the agency concluded that "there are many forms of 'diaries'" and that

"the determinative criteria as to whether these types of articles are deemed 'diaries' for classification purposes is whether they are primarily designed for use as, or primarily function as, articles for the receipt of daily notations, events and appointments." App., *infra*, 39a-40a. Since the daily planners imported by respondent are designed for those exact functions, the agency concluded that they constitute "diaries" within the meaning of HTSUS 4820.10.20. *Id.* at 34a, 43a.

The Customs Service further concluded that the daily planners imported by respondent are "bound" within the meaning of the statutory classification provision. App., *infra*, 44a-47a. The agency emphasized that, in determining what constitutes a "bound" "diary," the traditional elements of formal "bookbinding" are not applicable. "The issue is not what constitutes a bound book, and there is no requirement that a diary be in the format of a book." *Id.* at 44a. Instead, the agency noted that the official explanation of the term "bound" in the notes of the Harmonized System Committee—the international authority that drafted this customs provision—states that the term "bound" includes "reinforcements or fittings of metal, plastics, etc." *Id.* at 45a. The Customs Service noted that "this language [is] indicative of the drafters' intent to include as bound any articles possessing ring binders or spiral binders." *Ibid.* The agency concluded that, "whether ring binder or spiral" binder is used, "pages held together in this manner" are "bound" for the purposes of this customs provision. *Id.* at 46a.

Since respondent's daily planners are bound in this very manner, the Customs Service ruled that these articles are "bound" "diaries" to which the 3.2% duty applied under HTSUS 4820.10.20. App., *infra*, 46a-47a.

Respondent did not seek judicial review of that classification decision.

2. Six months later, however, respondent imported additional articles of the same type. The agency again ruled that these daily planners are subject to duty as "bound" "diaries." Respondent then raised exactly the same protest that the agency had just reviewed and rejected in HQ No. 955937. When that protest was again denied by the agency, respondent brought this action in the United States Court of International Trade to seek review of the agency's classification determination. App., *infra*, 19a.

3. The Court of International Trade has exclusive jurisdiction to review the denial of a protest from a Customs Service classification decision. 28 U.S.C. 1581(a). On cross-motions for summary judgment, the court upheld the agency's determination in this case.

The court noted that respondent's daily planners were "designed for notations concerning the full range of daily experience" and that any "supplementary material" they contain does not alter their primary character as business diaries. App., *infra*, 25a. The court explained that its prior decisions in *Fred Baumgarten* v. *United States*, 49 Cust. Ct. 275 (1962), and *Brooks Bros.* v. *United States*, 68 Cust. Ct. 91 (1972), indicate that when, as here, "the diary portion was the essential or indispensable part of the importation," that is "controlling of its classification." App., *infra*, 22a. The court noted that the the current "tariff language" in the HSTUS was "adopted with knowledge of these judicial precedents." *Id.* at 23a

(citing *Central Prods. Co.* v. *United States*, 936 F. Supp. 1002, 1006-1007 (Ct. Int'l Trade 1996)).[2]

The court also upheld the conclusion of the Customs Service that respondent's diaries were "bound" for purposes of HTSUS 4820.10.20. The court explained that "[t]he common meaning of 'bound' is fastened. The irrevocability of the fastening is not important so long as it goes beyond the transitory role of packaging." App., *infra*, 26a.

4. The Federal Circuit has exclusive jurisdiction to review decisions of the Court of International Trade. 28 U.S.C. 1295(a)(5). On appeal from the decision in this case, the Federal Circuit reversed. App., *infra*, 1a-16a.

a. The court of appeals first addressed whether it would afford deference to the classification rulings of the Customs Service in determining the proper "meaning and scope of tariff terms." App., *infra*, 4a. The court noted that, in *United States* v. *Haggar Apparel Co.*, 526 U.S. 380, 391 (1999), this Court held that (App., *infra*, 5a):

> if an HTSUS provision is ambiguous and Customs promulgates a regulation that "fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design," courts should give that judgment "controlling weight" as articulated in

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[2] The Court of International Trade did not cite or rely upon the Headquarters Rulings (HQ No. 955937 and HRL Nos. 955636 & 955637) that the Customs Service issued to respondent in resolving this same issue in 1994. See page 5, *supra*. The court did, however, find support for its interpretation in a different Customs Service ruling, HQ No. 955199, 1994 WL 85353 (Customs Jan. 24, 1994), in which the agency explained the distinction between items that are "similar" to diaries (for which a duty applies) and "other" items (for which no duty is applicable). App., *infra*, 24a ("The rationale used in that ruling is persuasive * * * .").

Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 [1984].

The Federal Circuit reasoned, however, "that *Haggar*, and thus *Chevron* deference, does not extend to ordinary classification rulings [of the Customs Service]." *Ibid.* The court stated that deference is inappropriate for tariff classification rulings because those rulings are issued without the benefit of public comment, "do not carry the force of law and are not, like regulations, intended to clarify the rights and obligations of importers beyond the specific case under review."[3] *Id.* at 6a. The court stated that the "significant differences between Customs regulations and Customs rulings convince this court that *Haggar*'s reach does not extend to standard Customs rulings." *Id.* at 6a-7a.[4] The court of appeals concluded that it would therefore "continue[] to adhere to its [pre-*Haggar*] precedent giving no deference to such rulings." *Id.* at 7a (citing *Rollerblade, Inc.* v. *United States*, 112 F.3d 481, 484 (Fed. Cir. 1997)).[5]

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[3] In so stating, the court of appeals failed to consider or address the express language of the regulations which makes such rulings "binding on all Customs Service personnel" and which specifies that "the principle" of the rulings "may be cited as authority in the disposition of transactions involving the same circumstances." 19 C.F.R. 177.9(a). See also 19 C.F.R. 177.10(a) (protest review decisions are "precedential").

[4] The court compared Customs Service classification rulings to IRS interpretive rulings, which the court stated have no "binding effect" on the courts. App., *infra*, 7a (citing, *e.g.*, *B.F. Goodrich Co.* v. *United States*, 94 F.3d 1545, 1550 n.5 (Fed. Cir. 1996); *Trainer* v. *United States*, 800 F.2d 1086, 1090 n.7 (Fed. Cir. 1986)). But see note 6, *infra*.

[5] Under Customs Service regulations, a new interpretation that would increase the duty from that applicable under a prior interpretation may not be adopted without prior Federal Register notice and opportunity for public comment. 19 C.F.R. 177.10(c). The court of appeals reserved the question whether such revocation decisions would be entitled to deference under *Chevron*. App., *infra*, 6a n.1.

b. Having thus chosen simply to disregard the interpretive classification rulings of the Customs Service, the Federal Circuit found it unnecessary to address or consider the detailed reasoning adopted by the Customs Service in issuing the Headquarters Rulings that apply to the facts of this case. See pages 5-7, *supra*. The court instead looked primarily to what it regarded as an appropriate dictionary definition of the term "diary" in the *Oxford English Dictionary* and concluded that, to be a "diary," an item of merchandise must have "relatively extensive" space for the recording not only "of the events themselves, but also a person's observations, thoughts, or feelings about them." App., *infra*, 12a. Giving no weight to the common commercial use of the term "diary," the court expressed the view that a daily planner that contains "a place to jot down the date and time" of future appointments cannot qualify as a "diary" because the very essence of a "diary" is to be "retrospective, not prospective." *Id.* at 12a-13a.

Applying "the above principles," the court concluded that respondent's daily planners are not "diaries" within the meaning of HTSUS Subheading 4820.10.20 because (i) "the space provided" in those planners "would not permit a diarist to record relatively extensive notations about events, observations, feelings, or thoughts" and, (ii) while "[t]hese pages facilitate advance planning and scheduling[,] * * * a diary is not for planning." App., *infra*, 13a-14a.

c. The court of appeals further concluded that respondent's daily planners are not "bound" within the meaning of the HSTUS 4208.10.20. To determine the meaning of this customs provision, the court looked to a book publishing industry definition of a "bound book" as a book that is "sewn, glued, or stapled into permanent bindings." App., *infra*, 15a. The court stated that a diary may be considered as "bound" under this book publishing definition only if a "permanent" binding has been employed. *Ibid.* Because respondents' product is "contained in ringed loose-leaf binders" that lack the "permanent" character of a "bound book," the court held that these items are not "bound" within the meaning of the tariff provision. *Id.* at 15a-16a.

In reaching that conclusion, the court of appeals did not address the reasoning of the applicable Headquarters Rulings or of the authorities cited therein. In particular, the court of appeals did not acknowledge or discuss the official interpretive statements of the Harmonized System Committee (which drafted these tariff provisions) which explain that the term "bound" "diaries" as used in HTSUS 4820.10.20 includes diaries that are bound with metal fittings, such as rings or spirals. See App., *infra*, 45a; page 7, *supra*.

d. The court of appeals held that, since respondents' daily planners are similar to, but are not, "bound" "diaries" within the meaning of this tariff provision, they are to be "classified under the 'other' subheading of [HTSUS] 4820.10.40," for which no duty applies. App., *infra*, 16a. The United States filed a timely petition for rehearing with suggestion for rehearing en banc. A response to the petition was requested by the court from respondent. The court thereafter denied the petition without a published vote. *Id.* at 17a.

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals departs from the consistent decisions of this Court and other courts of appeals that accord deference to the formal interpretations of statutes adopted by the agencies charged with their implementation. By denying deference to the Customs Service rulings that interpret and apply the detailed classification provisions of the Tariff Act, the decision in this case has left importers and the Customs Service without effective guidance for a wide range of transactions. Under the decision in this case, the ultimate application of customs provisions often cannot be determined or even reliably predicted except upon completion of judicial proceedings that occur well after the relevant transactions have been planned and conducted. By authorizing the agency to issue, in advance, "binding rulings prior to the entry of the merchandise," 19 U.S.C. 1502(a), and to issue precedential protest review decisions, 19 U.S.C. 1515(a), Congress sought to avoid the very uncertainty and wasteful litigation that the decision in this case promotes.

The petition for a writ of certiorari should be granted because of the clear departure of the decision below from the standards of deference required by the decisions of this Court and because of the exceptional importance of the questions presented to the planning of commercial transactions and to the administration of the customs laws.

1. a. It has long been a bedrock legal principle that courts are to accord deference to the formal interpretations of a statute adopted by the agency that has been "charged with responsibility for administering the provision" by Congress. *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837,

865 (1984). See, *e.g.*, *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 739 (1996) ("It is our practice to defer to the reasonable judgments of agencies with regard to the meaning of ambiguous terms in statutes that they are charged with administering."); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *McLaren* v. *Fleischer*, 256 U.S. 477, 481 (1921); *Brown* v. *United States*, 113 U.S. 568, 570-571 (1885); *Edwards's Lessee* v. *Darby*, 25 U.S. (12 Wheat.) 206, 209-210 (1827). The deference that this Court has consistently accorded to agency interpretations in decisions such as *Chevron* is fully applicable here.

Congress has authorized the agency to adopt such "binding rulings prior to the entry of the merchandise" as may "be necessary to secure a just, impartial, and uniform appraisement of imported merchandise and the classification and assessment of duties thereon * * * ." 19 U.S.C. 1502(a). Congress has further specified that, under the "rules and regulations prescribed by the Secretary," the Customs Service is to determine "the final appraisement of merchandise" and "fix the final classification and rate of duty applicable to such merchandise," 19 U.S.C. 1500(a), (b), and is then to issue decisions on any protests from such classification determinations, 19 U.S.C. 1515(a). In view of these broad delegations of authority, Congress emphasized in enacting the Harmonized Tariff Schedule of the United States in 1988 that "[t]he Customs Service will be responsible for interpreting and applying" this statute. H.R. Conf. Rep. No. 576, 100th Cong., 2d Sess. 549-550 (1988).

The reasoning of *Chevron* thus applies directly here. Courts are to defer to the agency's reasonable interpretation of the statute it administers because of the "presumption that Congress, when it left ambiguity in a statute meant for implementation by an agency,

understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. 735, 740-741 (1996).

b. This Court has not limited application of this principle of judicial deference solely to agency interpretations that are set forth in formal regulations. Instead, deference has been extended whenever the Court is satisfied that the interpretation "reflect[s] the agency's fair and considered judgment on the matter in question." *Auer* v. *Robbins*, 519 U.S. 452, 462 (1997) (agency litigation brief). See also *Reno* v. *Koray*, 515 U.S. 50, 61 (1995) (internal agency guidelines); *Shalala* v. *Guernsey Mem. Hosp.* 514 U.S. 87, 99 (1995) (agency's program manual); *Martin* v. *Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 157 (1991) (agency's administrative litigating position); *Gardebring* v. *Jenkins*, 485 U.S. 415, 429-430 (1988) (government's litigation position).

The Federal Circuit, however, has recently been reluctant to accept application of the judicial deference principles of *Chevron* to cases involving the collection of customs duties. In a line of cases that began in *dicta* in *Crystal Clear Industries* v. *United States*, 44 F.3d 1001, 1003 * (Fed. Cir. 1995), and culminated in *Rollerblade, Inc.* v. *United States*, 112 F.3d 481, 484 (Fed. Cir. 1997), the Federal Circuit has declined to give any deference to the agency's interpretations of the customs laws. This Court unanimously rejected those recent holdings of the Federal Circuit in *United States* v. *Haggar Apparel Co.*, 526 U.S. 380, 391-392 (1999). In *Haggar*, the Court held that, when "the agency's statutory interpretation 'fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design,

we give [that] judgment "controlling weight."'" *Id.* at 392 (quoting *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. 251, 257 (1995) (quoting *Chevron*, 467 U.S. at 844)).

In the present case, however, instead of following the directives of *Chevron* and *Haggar*, the court of appeals stated that it would "continue[] to adhere to its precedent giving no deference to such rulings." App., *infra*, 7a (citing *Rollerblade, Inc.* v. *United States*, 112 F.3d at 484). The court stated that its refusal to follow *Chevron* and *Haggar* in the present case was justified by the difference "between Customs regulations [involved in *Haggar*] and customs rulings [involved in this case]" (App., *infra*, 6a). The court's holding that no deference is owed to administrative interpretations unless they are set forth in formal regulations, however, squarely conflicts with the decisions of this Court and other courts of appeals.

For example, in *NationsBank of North Carolina, N.A.* v. *Variable Annuity Life Insurance Co.*, 513 U.S. at 257—which this Court prominently cited and quoted in *Haggar*, 526 U.S. at 391-392—the Court held that deference must be given to "an expert administrator's statutory exposition" even though the agency's interpretation was not set forth in any regulation or formal ruling. The Court held that, because the administrator's "construction of the Act is reasonable," it "warrants judicial deference." 513 U.S. at 254. See also *Auer* v. *Robbins*, 519 U.S. at 462; cases cited page 15, *supra*.[6] And, in a decision that applies directly to this

[6] The Federal Circuit manifestly erred in suggesting that deference may not be owed to Revenue Rulings issued under the Internal Revenue Code. See App., *infra*, 7a. In *United States* v. *Correll*, 389 U.S. 299, 302 n.10 (1967), this Court reviewed a

case, the Court in *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978), upheld a Treasury ruling that interpreted the countervailing duty provisions of the Tariff Act—even though that ruling was not contained in a notice-and-comment regulation. The Court concluded that the agency's "longstanding and consistent administrative interpretation is entitled to considerable weight" and should be sustained if it reflects a "sufficiently reasonable" elaboration of the statutory scheme. *Ibid.*

The Federal Circuit's determination to give *no* deference to the agency's reasonable exposition of the statute in this case thus directly conflicts with *Zenith Radio*, as well as with *Haggar* and *Chevron*. It also conflicts with the decisions of numerous courts of appeals holding that agency interpretations adopted by means other than formal regulations are entitled to

Revenue Ruling that interpreted a provision of the Code that concerned a deduction for business expenses incurred away from home. The Court held that, although "[a]lternatives to the Commissioner's * * * rule are of course available," the agency's interpretation must be upheld when it is "reasonable" because "Congress has delegated to the Commissioner, not to the courts, the task of prescribing 'all needful rules and regulations for the enforcement' of the Internal Revenue Code. 26 U.S.C. § 7805(a)." 389 U.S. at 306-307. The Court held in *Correll* that, "[i]n this area of limitless factual variations, 'it is the province of Congress and the Commissioner, not the courts, to make the appropriate adjustments.'" 389 U.S. at 307 (quoting *Commissioner* v. *Stidger*, 386 U.S. 287, 296 (1967)). In *Davis* v. *United States*, 495 U.S. 472, 484 (1990), the Court further explained that, while revenue rulings "do not have the force and effect of regulations," the "agency's interpretations and practices" are nonetheless to be given "considerable weight" when "they involve the contemporaneous construction" of the statute or "have been in long use." *Ibid.* The Federal Circuit erred in ignoring this longstanding precedent in stating its opposite view in this case.

judicial deference. See, *e.g.*, *Auer* v. *Robbins*, 519 U.S. at 462; *Association of Bituminous Contractors, Inc.* v. *Apfel*, 156 F.3d 1246, 1251-1252 (D.C. Cir. 1998); *Gould* v. *Shalala*, 30 F.3d 714, 719-720 & n.7 (6th Cir. 1994); *State of Georgia, Dep't of Med. Assistance* v. *Shalala*, 8 F.3d 1565, 1571 n.8 (11th Cir. 1993); *Coca Cola Co.* v. *Atchison, Topeka, & Sante Fe Ry.*, 608 F.2d 213, 215 (5th Cir. 1979). See also *Elizabeth Blackwell Health Ctr. for Women* v. *Knoll*, 61 F.3d 170, 181-182 (3d Cir. 1995) (according deference to agency policy statement), cert. denied, 516 U.S. 1093 (1996); *Emerson* v. *Steffen*, 959 F.2d 119, 122 (8th Cir. 1992) (same).

The courts of appeals have described more than one standard of judicial deference for the various types of agency interpretations that are not set forth in formal regulations. Compare, *e.g.*, *First Chicago NBD Corp.* v. *Commissioner*, 135 F.3d 457, 459 (7th Cir. 1998); *Martinez* v. *Flowers*, 164 F.3d 1257, 1260 (10th Cir. 1998); *Washington* v. *HCA Health Servs. of Texas, Inc.*, 152 F.3d 464, 469 (5th Cir. 1998); *Reich* v. *John Alden Life Ins. Co.*, 126 F.3d 1, 7 (1st Cir. 1997); *New York City Health & Hosps. Corp.* v. *Perales*, 954 F.2d 854, 861 (2d Cir. 1992). See also *Merck & Co.* v. *Kessler*, 80 F.3d 1543, 1550 (Fed. Cir. 1996). All courts of appeals *other* than the Federal Circuit, however, accord either substantial weight or controlling weight to the formal rulings issued by an agency's headquarters for guidance to the public.[7] No court of appeals has joined the

[7] For example, in *Ritter* v. *Cecil County Office of Housing & Community Development*, 33 F.3d 323, 328 (4th Cir. 1994), the court explained that "[a]lthough less deference may be due when considering an agency's interpretative rules than when a federal agency adopts regulations through the official rulemaking process, * * * the nature of our inquiry * * * is quite similar." See also *Warder* v. *Shalala*, 149 F.3d 73, 57 (1st Cir. 1998) (it is not necessary to choose between *Chevron* and *Skidmore* formulations when the government's interpretation prevails under either), cert. denied, 119 S. Ct. 1455 (1999); *Wilshire Westwood Assocs.* v. *Atlantic Richfield Corp.*, 881 F.2d 801, 809 (9th Cir. 1989).

Federal Circuit in categorically disqualifying from *any* deference the entire body of an agency's formal interpretative rulings that are not contained in the agency's notice-and-comment regulations.[8] The uniquely nondeferential treatment afforded by the Federal Circuit to administrative interpretations—arising in a court of appeals whose central function is to review actions taken by federal agencies—warrants review by this Court.

2. Under the proper standard of deference that applies to agency interpretations of the "statutes that they are charged with administering" (*Smiley* v. *Citibank (South Dakota), N.A.*, 517 U.S. at 739), the Customs Service classification ruling should have been sustained in this case. The Headquarters Rulings at issue in this case were not sparsely explained or hidden from public view. See App., *infra*, 28a-47a. To the contrary, the agency's rulings set forth a significantly more refined, and less wooden, interpretation of the statutory language than is manifested in the decision of the court of appeals.

The tariff classification issue in this case requires interpretation of two terms in Subheading 4820.10.20 of the HTSUS—"diaries" and "bound." The court of appeals refused to consider the detailed Headquarters Rulings (HQ No. 955937 and HRL Nos. 955636, 955637)

[8] This Court has made clear that the procedure chosen by a federal agency—rulemaking *versus* adjudication—is a matter properly left to the discretion of the agency. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 292-293 (1974); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202 (1947).

issued by the Customs Service that have "consistently determined that articles similar in design and/or function to the instant merchandise are classifiable as diaries." App., *infra*, 31a. In these rulings, the Service has rejected respondent's reliance on narrowly selected dictionary definitions, noting that "[m]any words have several definitions and Customs may consider any or all of them when making a classification determination." *Id.* at 33a.[9] In particular, the Customs Service has explained that reliance on any single, narrow definition is inconsistent with the commercial context in which the tariff provisions apply: business "diaries" are a recognized commercial product and this "broader concept of diary * * * reflects the common and commercial identity of these items in the marketplace." *Id.* at 34a.[10]

The Customs Service has also properly concluded that these daily planners are "bound" for purposes of HTSUS 4820.10.20. App., *infra*, 44a-46a. The Customs Service disagreed with respondent's contention that a definition of a "bound book" from the publishing industry controls in determining whether a "diary" is "bound" under this Subheading. "The issue is not what constitutes a bound book, and there is no requirement that a diary be in the format of a book." *Id.* at 44a. The Service instead relied on the Harmonized Commodity

[9] The Customs Service correctly noted that "the narrower definition of 'diary', as set forth in the *Oxford English Dictionary's* first definition, connotes an article containing blank pages used to record extensive notations of one's daily activities. This is not the sole format for a diary." App., *infra*, 33a.

[10] The Customs Service found additional support for this functional approach in the precedents of the former Customs Court. App., *infra*, 36a-40a (citing *Fred Baumgarten* v. *United States*, 49 Cust. Ct. 275 (1962), and *Brooks Bros.* v. *United States*, 68 Cust. Ct. 91 (1972)).

Description and Coding System Explanatory Notes—"which represent the official interpretation of the HTS at the international level"—which state that "goods of this heading may be bound with materials other than paper (e.g., leather, plastics or textile material) and have reinforcements or fittings of metal, plastics, etc." *Id.* at 45a. The agency concluded that this official explanation makes it "clear that the Harmonized System Committee contemplated metal binders as being within this heading's definition of bound articles." *Ibid.* The conclusion that respondent's daily planners are "bound" under this Subheading not only comports with the official interpretation of the drafting authority, it also makes "semantic" sense: "[A] binder, whether a ring binder or spiral, is that which binds pages together in a fixed order. Pages held together in this manner are bound, and the diary is therefore deemed a bound article." *Id.* at 46a.

The court of appeals did not suggest that the agency's thorough, well-formulated interpretation of the statute is not a reasonable elaboration of its provisions. Instead, the court of appeals simply displaced the agency's reasonable interpretation of the Tariff Act with another perhaps plausible interpretation of its own. See pages 5-7, 9-12, *supra*.[11] That action by the court of appeals was in error: "the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Chevron*, 467

[11] In view of the fact that the court of appeals declined to consider industry usage, and failed to address the official interpretation of the tariff provision by the international drafting authority, it could fairly be questioned whether the decision of the court of appeals itself bears the indicia of a "reasonable" elaboration of the statute. See page 9-12, *supra*.

U.S. at 843. When, as in this case, the agency's interpretation "defines a term in a way that is reasonable in light of the legislature's revealed design," the agency's judgment is to be given "controlling weight." *Nationsbank of North Carolina, N.A.* v. *Variable Annuity Life Ins. Co.*, 513 U.S. at 257.

3. The refusal of the court of appeals to defer to the agency's interpretations of the detailed classification provisions of the Tariff Act has substantial practical importance. The agency has routinely employed rulings, rather than regulations, to address application of the detailed customs provisions to the "limitless factual variations" created by modern commerce (*United States* v. *Correll*, 389 U.S. at 307). By denying deference to the agency's interpretations of these intricate provisions, the Federal Circuit has left both importers and the Customs Service without effective guidance for a wide range of transactions. The result of the ad hoc approach adopted in this case is expensive customs litigation and unpredictable outcomes.

There is nothing unique about the Customs Service, or the scheme of judicial review to which its rulings and decisions are subject, that would justify the anomalous regime imposed by the court of appeals. Deference to the views of the federal officials who administer tariff legislation is not new; it dates to the beginning of the customs laws and is thus as old as the Republic itself. See *Zenith Radio Corp.* v. *United States*, 437 U.S. at 450; *United States* v. *Vowell*, 9 U.S. (5 Cranch) 368, 372 (1809). Indeed, until quite recent times, the Federal Circuit and the Court of International Trade had consistently accorded deference to administrative interpretations in customs litigation. See, *e.g.*, *Guess? Inc.* v. *United States*, 944 F.2d 855, 858 (Fed. Cir. 1991); *Generra Sportswear Co.* v. *United States*, 905 F.2d 377, 379 (Fed. Cir. 1990); *Mitsui Foods, Inc.* v. *United States*, 867 F.2d 1401, 1403 & n.3 (Fed. Cir. 1989); *DAL-Tile Corp.* v. *United States*, 829 F. Supp. 394 (Ct. Int'l Trade 1993). See also Re, *Litigation Before the United States Court of International Trade*, 19 U.S.C.A. §§ 1-1300, Cum. Ann. Pocket Part, at XI, XL-XLI (1998). The Federal Circuit's recent departure from this traditional standard of deference is a development that this Court rejected in *Haggar*, 526 U.S. at 391-392 (citing *Rollerblade*, *supra*, with disapproval).

Absent review by this Court, however, the decision in this case—which seeks to revive the views rejected in *Haggar*—will have binding effect throughout the Nation. That is because the Court of International Trade has exclusive jurisdiction over customs cases, and the Federal Circuit has exclusive jurisdiction over appeals from the Court of International Trade. In similar circumstances, this Court has recognized the need for plenary review of Federal Circuit decisions of significant fiscal and administrative importance. See, *e.g.*, *United States* v. *Hill*, 506 U.S. 546, 549 (1993); *United States* v. *Goodyear Tire & Rubber Co.*, 493 U.S. 132, 138 (1989); *United States* v. *American Bar Endowment*, 477 U.S. 105, 109 (1986). Such review is appropriate in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

No. 98-1569

THE MEAD CORPORATION, PLAINTIFF-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLEE

July 28, 1999

Before NEWMAN, RADER, and SCHALL,
Circuit Judges.

RADER, Circuit Judge.

On summary judgment, the Court of International Trade affirmed the United States Customs Service's classification of day planners imported by The Mead Corporation as bound diaries. Because the terms within subheading 4820.10.20 of the Harmonized Tariff Schedules of the United States (HTSUS), namely "diaries" and "bound," do not encompass the imported articles, this court reverses.

I.

At issue are five models of Mead's day planners (model nos. 47192, 47062, 47124, 47104, and 47102). Stylistically, the day planners differ from each other based on their size (ranging from 7 1/2" x 4 3/8" to 12" x 10 5/8"), outer jacket cover material, and type of closure. The basic model contains a calendar, a section for daily notes, a section for telephone numbers and addresses, and a notepad. The larger models contain the features of the basic model and additional items such as a daily planner section, plastic ruler, plastic pouch, credit card holder, and computer diskette holder. A loose-leaf ringed binder holds the contents of the day planner, except for the notepad, which fits into the rear flap of the day planner's outer cover.

In a January 11, 1993 ruling, Customs classified the subject planners as bound diaries under subheading 4820.10.20 (emphasis added):

> 4820 Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, *diaries and similar articles*, exercise books, blotting pads, binders (looseleaf or other), folders, file covers, manifold business forms, interleaved carbon sets and other articles of stationery, of paper or paperboard; albums for sample or for collections and book covers (including cover boards and book jackets) of paper or paperboard:

> 4820.10 Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, *diaries and similar articles*:
>
> 4820.10.20 *Diaries*, notebooks and address books, *bound*; memorandum pads, letter pads and similar articles

Moving for summary judgment in the trial court, Mead attacked Customs' ruling on two grounds. Mead argued that (1) the articles were not diaries, and (2) the articles were not bound. Either contention, if accepted, compels classification under the "other" provision of subheading 4820.10.40. Under that subheading, Mead would owe no tariff on the imported articles, in contrast with the 4.0% tariff assessed in Customs' 1993 ruling. In support of its motion, Mead submitted dictionary definitions of the terms at issue, affidavits from seven individuals from the U.S. stationery goods industry, and affidavits from two bookbinding experts. The government cross-moved for summary judgment in support of Customs' classification, offering its own definitions of "diary" and "bound," and submitting supporting affidavits.

In a July 14, 1998 opinion (No. 98-101), the trial court granted the government's motion. The Court of International Trade broadly defined "diaries" as "articles whose principle purpose is to allow a person to make daily notations concerning events of importance." Using that definition, the trial court decided that Mead's day planners qualify as diaries even though they admittedly contain "supplementary material," that is, non-diary elements such as a section for addresses and telephone numbers. With respect to the term "bound," the trial court opined: "The common meaning

of 'bound' is fastened. The irrevocability of the fastening is not important so long as it goes beyond the transitory role of packaging." Using that broad meaning for "bound," the trial court found that Mead's day planners, whose contents fit in a loose-leaf ringed binder, fall within that definition.

On appeal, Mead contests the trial court's definitions of "diaries" and "bound." Mead contends that "diaries" means: "A book for recording a person's observations, thoughts and/or events." Mead further contends that an item is "bound" only when "permanently secured along one edge between covers in a manner traditionally performed by a bookbinder."

II.

This court reviews the Court of International Trade's grant of summary judgment without deference. *See Sharp Microelecs. Tech., Inc. v. United States*, 122 F.3d 1446, 1449 (Fed. Cir. 1997). Where, as here, the parties do not dispute material facts regarding the imported goods, the analysis of whether the trial court properly classified the goods collapses into a determination of the proper meaning and scope of the HTSUS terms. *See SGI, Inc. v. United States*, 122 F.3d 1468, 1471 (Fed. Cir. 1997).

The Supreme Court's recent pronouncement in *United States v. Haggar Apparel Co.*, 526 U.S. 380, 119 S. Ct. 1392, 143 L.Ed.2d 480 (1999) has raised questions concerning the standard of review applicable to determinations of the meaning and scope of tariff terms. *See Avenues in Leather, Inc. v. United States*, 178 F.3d

1241, 1999 WL 342226, at *2 (Fed. Cir. May 20, 1999). The meaning of a tariff term, a matter of statutory interpretation, is a question of law. *See Bauerhin Tech. v. United States*, 110 F.3d 774, 776 (Fed. Cir. 1997). Accordingly, this court has previously accorded Customs' classification rulings no deference. *See Rollerblade, Inc. v. United States*, 112 F.3d 481, 483-84 (Fed. Cir. 1997). In *Haggar*, however, the Supreme Court held that if an HTSUS provision is ambiguous and Customs promulgates a regulation that "fills a gap or defines a term in a way that is reasonable in light of the legislature's revealed design," courts should give that judgment "controlling weight" as articulated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984). *Haggar*, 119 S. Ct. at 1399. Thus this court must decide whether that decision applies in this case where Customs has not issued a regulation, but has merely issued a classification ruling implicitly interpreting an HTSUS provision. For the reasons articulated below, this court determines that *Haggar*, and thus *Chevron* deference, does not extend to ordinary classification rulings.

The United States Code has specifically given Customs the power to promulgate regulations. *See* 19 U.S.C. § 1502(a) (1994). Where, as in *Haggar*, Customs issues a regulation under the procedural rigors dictated by the Administrative Procedure Act, *see* 5 U.S.C. § 553 (1994), that regulation has the enforceability of law. *See Chrysler Corp. v. Brown*, 441 U.S. 281, 295, 99 S. Ct. 1705, 60 L.Ed.2d 208 (1979); Bernard Schwartz, *Administrative Law* 182-83 (3d ed. 1991). A regulation, however, must first undergo a notice and comment period during which the interested public can "parti-

cipate in the rule making through submission of written data, views, or arguments." 5 U.S.C. § 553(c). Moreover, even after promulgation, a regulation is subject to petitions in which interested persons may seek to amend or repeal the new policy. *See* 5 U.S.C. § 553(e). A regulation that endures this process carries the full weight of Customs' rulemaking authority. *See Parker v. Office of Personnel Management*, 974 F.2d 164, 166 (Fed. Cir. 1992) (recognizing that by enacting regulations, agencies put a "gloss" on their statutory interpretations). A regulation thus represents a reasoned and informed articulation of Customs' statutory interpretation, which serves to "clarify the rights and obligations of importers." *Haggar*, 119 S. Ct. at 1398.

In contrast, such procedural safeguards do not accompany typical Customs rulings.[1] The process of such rulings, for example, does not involve public debate or discussion, but is confined to the specific facts of and parties to the particular transaction at issue. *See* 19 C.F.R. § 177.0, 177.1(a) (1998). Moreover, Customs rulings do not carry the force of law and are not, like regulations, intended to clarify the rights and obligations of importers beyond the specific case under review. Instead, a ruling merely interprets and applies Customs laws to "a specific set of facts." 19 C.F.R. § 177.1(d)(1) (defining "ruling"). These significant differences between Customs regulations and Customs rulings convince this court that *Haggar*'s reach does not

[1] Certain rulings—specifically, those which have the "effect of changing a practice"—undergo notice-and-comment procedures. 19 C.F.R. § 177.10(c) (1998). This case does not involve such a ruling, and this court expresses no opinion as to what level of deference, if any, would apply in that circumstance.

extend to standard Customs rulings. Accordingly, this court continues to adhere to its precedent giving no deference to such rulings. *See Rollerblade*, 112 F.3d at 484.

In reaching this conclusion, this court also finds apt the Supreme Court's analogy in *Haggar* between trade and tax matters. *See Haggar*, 119 S. Ct. at 1400. The Supreme Court has decided that Treasury regulations interpreting tax statutes deserve deference. *See Atlantic Mut. Ins. Co. v. Commissioner*, 523 U.S. 382, 389, 118 S. Ct. 1413, 140 L.Ed.2d 542 (1998) (when a term in the Internal Revenue Code is ambiguous, "the task that confronts us is to decide, not whether the Treasury regulation represents the best interpretation of the statute, but whether it represents a reasonable one."); *see also Schuler Indus., Inc. v. United States*, 109 F.3d 753, 755 (Fed. Cir. 1997). Internal Revenue Service (IRS) interpretive rulings, in contrast, "do not have the force and effect of regulations." *Commissioner v. Schleier*, 515 U.S. 323, 336 n. 8, 115 S. Ct. 2159, 132 L.Ed.2d 294 (1995). Accordingly, this court has not afforded them *Chevron* deference. *See B.F. Goodrich Co. v. United States*, 94 F.3d 1545, 1550 n. 5 (Fed. Cir. 1996) ("We recognize, however, that IRS Revenue Rulings have no binding effect on this court."); *Trainer v. United States*, 800 F.2d 1086, 1090 n. 7 (Fed. Cir. 1986) (noting that "Treasury Regulations are of greater force and effect than Revenue Rulings.").

Customs' classifications rulings are in some ways an even less formalized body of interpretation than IRS revenue rulings. IRS revenue rulings, for example, issue from a single body—the IRS's National Office—and appear in the Internal Revenue Bulletin.

See 26 C.F.R. § 601.201(6) (1998). Customs' rulings, in contrast, issue not only from Customs Headquarters, but from each port office of the Customs Service. *See* 19 C.F.R. § 177.2(b)(2)(ii)(B). Moreover, while Customs may publish its rulings in the Customs Bulletin, the regulations do not require it to do so. *See* 19 C.F.R. § 177.10(a). In short, the parallels between IRS Revenue Rulings and Customs rulings further convince this court that the latter, like the former, do not require *Chevron* deference.

III.

This court construes a tariff term according to its common and commercial meanings, which it presumes are the same. *See Simod Am. Corp. v. United States*, 872 F.2d 1572, 1576 (Fed. Cir. 1989). To ascertain the common meaning of a tariff term, this court has consulted dictionaries, scientific authorities, and other reliable information sources. *See C.J. Tower & Sons v. United States*, 69 C.C.P.A. 128, 673 F.2d 1268, 1271 (1982).

A. Diaries

The trial court gleaned its broad meaning of diaries from three prior cases. In *Baumgarten v. United States*, 49 Cust.Ct. 275, 1962 WL 10886 (1962), the court considered a plastic-covered book, 4 1/4 "by 7 3/8", having pages for addresses and telephone numbers followed by ruled pages allocated to the days of the year and the hours of the day. Calendars for the current and following months headed the ruled pages. The importer invoiced the articles as "desk-diaries." In classifying them as diaries rather than as "other blank

books and slate books," the court looked first to the definition of a diary in *Webster's New International Dictionary of the English Language* (2d ed. 1951): "A register of daily events or transactions; a daily record; journal; esp., a book for personal notes or memoranda, or for details of experiences or observations of the writer; also, a blank book for daily memoranda." *Id.* at 276. From this definition, the court decided:

> [T]he particular distinguishing feature of a diary is its suitability for the receipt of daily notations. . . . By virtue of the allocation of spaces for hourly entries during the course of each day of the year, the books are designed for that very purpose. That the daily events to be chronicled may also include scheduled appointments would not detract from their general character as appropriate volumes for the recording of daily memoranda.

Id.

In *Brooks Brothers v. United States*, 68 Cust. Ct. 91 (1972), the court considered an "Economist Diary," a 10" by 8" spiral bound article, covered in red leather, with fine plate-finish parchment. The importer did not dispute that the Diary was composed in part of pages suitable for use as a diary, but argued that the Diary also contained printed informational material such as maps and thus could not be classified as "Blank books, bound: Diaries." Discussing *Baumgarten*, the court noted: "Judicial authority, therefore, has adopted the crux of the lexicographic definitions that the 'particular distinguishing feature of a diary is its suitability for the receipt of daily notations.'" *Brooks Brothers*, 68 Cust. Ct. at 97. The court concluded that although the informational pages added to the usefulness or value of the

article, the diary portion of the Economist Diary, "clearly 'suitable for the receipt of daily notations,'" was essential. *Brooks Brothers*, 68 Cust. Ct. at 97-98.

Finally, in *Charles Scribner's Sons v. United States*, 574 F. Supp. 1058, 6 C.I.T. 168 (1983), the court classified an "Engagement Calendar," a 9 3/8" by 6 1/2" spiral bound article with photographs on the left side and a table of the days of the week on the right, as a calendar rather than a diary. It acknowledged the *Baumgarten* and *Brooks Brothers* cases, but decided that, in contrast to a diary which is "primarily intended to be used in connection with extensive notations," the article at issue was intended only "for a notation of no more than a sentence or two." *Id.* at 175, 574 F. Supp. at 1063.

The trial court in this case relied heavily on these cases for its definition of diaries. These cases, however, involved classification of goods under tariff provisions different from those presented in this case. These prior cases therefore supply only limited guidance for this case. In *Charles Scribner's Sons*, for instance, the court decided between classifying the articles as calendars or diaries. Neither party to this case asserts that the day planners should be classified as calendars. In *Baumgarten*, the court classified the articles at issue under the Tariff Act of 1930, which as then amended provided sparse guidance under Schedule 14 ("Papers and Books"):

Blank books and slate books:

Address books, diaries, and notebooks

Other

Similarly the court in *Brooks Brothers* decided its case with similarly sparse guidance from the predecessor to tariff provision 4820.10.20 in the Tariff Schedule of the United States (TSUS):

Schedule 2. Wood and Paper; Printed Matter

Part 4. Paper, Paperboard, and Products Thereof

Subpart C. Paper and Paperboard Cut to Size or

Shape; Articles of Paper and Paperboard

Blank books, bound:

256.56 Diaries, notebooks, and address books

256.58 Other

Neither of these prior incarnations of the tariff schedule contain the specificity found in the corresponding HTSUS headings. The more precise HTSUS classification scheme, which distinguishes diaries from articles similar to diaries, necessitates a more precise definition of the terms at issue. Stated another way, while the blunt dividing line used in *Baumgarten* and *Brooks Brothers* may have sufficed to distinguish diaries from other blank books, this court must draw the line distinguishing diaries from articles similar to diaries with a finer point.

The *Oxford English Dictionary*, at 612 (1989), defines a diary as: "1. A daily record of events or transactions, a journal; specifically, a daily record of matters affecting the writer personally, or which come under his personal observation." This definition largely comports with the definition cited in *Baumgarten* and with other dictionary definitions. The *American Heritage Dictionary of the English Language*, at 516 (3d ed. 1992), for example, defines a diary as: "1. A daily record, especially a personal record of events, experiences, and observations, a journal." *See also Webster's New Twentieth Century Dictionary of the English Language* at 504 (2d ed. 1961) ("1. a daily written record, especially of the writer's own experiences, thoughts, etc."). These definitions reflect the two key aspects of a diary.

A diary must allow its user to keep a record, especially, as the Court of International Trade recognized, "concerning events of importance." Thus, a diary would include not only a factual record of the events themselves, but also a person's observations, thoughts, or feelings about them. This court disagrees with the trial court, however, that the record may be composed of the broad range of writings embraced by the term "notations." That term encompasses the use of only a word or even the briefest phrase—writings of a length insufficient to record events, observations, thoughts, or feelings. To constitute a record at all, then, the notations must be relatively extensive. In the words of *Charles Scribner's Sons*, the article must have space for "more than a sentence or two." 574 F.Supp. 1058, 6 CIT at 175.

In addition, a diary must actually be a "record" in the sense that it "recalls or relates *past* events." *Webster's*

Ninth New Collegiate Dictionary at 984 (1990) (emphasis added). A diarist records events, observations, feelings, or thoughts after they happen. Thus, a diary is retrospective, not prospective. A diary is not a place to jot down the date and time of a distant dentist appointment, regardless of whether that appointment would constitute an "event of importance."

Applying the above principles, the articles at issue fall into the category of articles similar to diaries (encompassed by "other" in subheading 4820.10.40) rather than as diaries under subheading 4820.10.20. As an initial matter, neither the trial court decision nor the government's brief identifies which part of the day planners they consider the diary portion. This court assumes that the court below focused on the "daily planner" section, which all five-day planner models have in common.[2] The daily planner section includes a series of pages allocated to days and numbered with the hours of the day along the left hand side of the page. Two blank lines (four shorter lines in the largest model) extend to the right of each hour. Suffice it to say that the space provided by these blank lines would not permit a diarist to record relatively extensive notations about events, observations, feelings, or thoughts. This limited space permits instead only the briefest notations. Space for only a word or phrase disqualifies these articles as diaries.

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[2] To the extent the government relies on any other portion of the day planners not discussed herein, this court has considered all sections and has determined that none qualify the article as a diary.

Moreover, an examination of the articles themselves reveals that the space provided was not intended for recording past events. The top of each page carries the caption "Daily Planner" and the word "Appointments" appears above the blank lines. These pages facilitate advance planning and scheduling. As noted above, however, a diary is not for planning. Instead, a diary receives a retrospective record of events, observations, thoughts, or feelings about them. Mead markets its entire article as a "Day *Planner*," further buttressing the distinction between this prospective scheduling article and a diary. While the importer's marketing of the goods will not dictate the classification, such evidence is relevant to the determination and, in this case, weighs against classifying the articles as diaries. Indeed, the earlier trade cases—*Baumgarten* (desk-diaries); *Brooks Brothers* (Economist Diary); *Charles Scribner's Sons* (Engagement Calendar)—turned at least in part on the fact that the importers themselves regarded their articles either as diaries or as calendars. *See, e.g., Brooks Brothers*, 68 Cust. Ct. at 98 ("[T]he Economist Diary is . . . by its own description a 'diary'").

B. Bound

Reasoning that the tariff provisions at issue cover a "wide variety of book and non-book articles," the trial court eschewed the meaning of "bound" as used in the trade of book manufacturing in favor of the purported common meaning of the term. While true that heading 4820 covers book and non-book articles, the term "bound" does not appear in that heading. Rather, the term appears for the first time in subheading 4820.10.20 where it modifies "Diaries, notebooks and address

books." These three items, the parties agree, are all books. Thus, the trial court's premise that the provision at issue covers non-book articles falls, as does its conclusion. Because the subheading uses the term bound in connection with types of books, this court looks to the common meaning of that term in that context.

The Dictionary of Publishing, at 43-44 (1982), defines the term "bound book" as: "Books that have been cased in, usually referring to books that have been sewn, glued, or stapled into permanent bindings." *Webster's Ninth New Collegiate Dictionary* defines "bound" as "4. *of a book*: secured to the covers by cords, tapes, or glue." All of the binding methods described in these definitions are permanent bindings. Thus, this court concludes that the term "bound," when used with reference to books as in subheading 4820.10.20, means permanently secured or fastened. In addition, affidavits from bookbinding and stationery goods experts in the record confirmed this meaning of the term "bound" in its proper context.

The Court of International Trade's definition of "bound," in contrast, essentially renders that limitation superfluous. A "bound diary" contemplates the existence of an "unbound diary." But if "bound" means fastened regardless of the permanency, what is an "unbound diary"? At oral argument, the government argued that a stack of loose-leaf pages could constitute an unbound diary. While such a stack would certainly be unbound, this court seriously questions whether it would qualify as a diary. The definition adopted in this opinion, however, leaves some meaning to the class of goods known as unbound diaries, namely, those not

permanently fastened. The day planners at issue, contained in ringed loose-leaf binders, fall squarely within that class of goods.

IV.

For the independent reasons that the subject articles are neither "diaries" nor "bound," this court reverses the trial court's classification of the goods. The goods are properly classified under the "other" subheading of 4820.10.40.

COSTS

Each party shall bear its own costs.

REVERSED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ORDER

A petition for rehearing en banc having been filed by the APPELLEE, and a response thereto having been invited by the court and filed by the APPELLANT, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on November 8, 1999.

FOR THE COURT,

/s/ JAN HORBALY (AV)
JAN HORBALY
Clerk

Dated: November 1, 1999

cc: Sidney H. Kuflik
Amy M. Rubin

Terence P. Stewart

MEAD CORP V US, 98-1569
(CIT - 95-12-01783)

APPENDIX C

UNITED STATES COURT OF
INTERNATIONAL TRADE

Slip. Op. 98-101
Court No. 95-12-01783

THE MEAD CORPORATION, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

July 14, 1998

OPINION AND ORDER

WATSON, Senior Judge.

This action involves the tariff classification of imported loose-leaf books containing calendars, room for daily notes, telephone numbers, addresses and notepads. This sort of product originated in England and is probably best known under the trademark of Filofax.[1]

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[1] Filofax, Inc., importer and U.S. distributor of the "Filofax" line of products, has filed an amicus curiae brief. It did so primarily to make the point, hereby acknowledged, that "Filofax" is a registered trademark, properly used only in connection with Filofax products. It is not a generic term for the type of products involved in this case. As for the classification issues involved herein, Filofax is pursuing its own actions with respect to the classification of its products.

The importations were classified as bound diaries under Subheading 4820.10.20 of the Harmonized Tariff Schedules of the United States ("HTSUS"). That provision, in context, reads as follows:

> 4820 Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles, exercise books, blotting pads, binders (looseleaf or other), folders, file covers, manifold business forms, interleaved carbon sets and other articles of stationery, of paper or paperboard; albums for samples or for collections and book covers (including cover boards and book jackets) of paper or paperboard:
>
> 4820.10 Registers, account books, notebooks, order books, receipt books, letter pads, memorandum pads, diaries and similar articles:
>
> CLASSIFIED:
>
> 4820.10.20 Diaries, notebooks and address books, bound; memorandum pads, letter pads and similar articles 3.2%
>
> CLAIMED:
>
> 4820.10.40 Other ..... Free

Mead has moved for partial summary judgment with respect to two causes of action, first, that the importations are not "diaries" and, second, that the importations are not "bound." A third cause of action, relating to two of the imported styles, in which the loose-leaf binder is not riveted to the jacket cover, are

not included in plaintiff's motion. The government's crossmotion covers the entire action and seeks summary judgment that all the importations are bound diaries as a matter of law and were properly classified as such. The parties agree that the resolution of this action depends on the determination of the meaning of the words "diary" and "bound" as used in the relevant subheading.

Plaintiff's first argument is that the importations are not diaries within the meaning of Subheading 4820.10.20. The Court notes that, if this is so, they would not be classifiable as similar to diaries under that subheading even though the subheading ends with the phrase "and similar articles." This is so because, unlike Subheading 4820.10, the phrase "and similar articles" in Subheading 4820.10.20 does not refer back to diaries. The semicolon in that subheading breaks it into separate units and only memorandum pads and notepads are the subjects of the final phrase "and similar articles." In other words, if the importations are similar to diaries, but not actually diaries, they would not fit into subheading 4820.10.20 and plaintiff's claim would be correct.

Both parties argue that their position is supported by prior case law. However, in the opinion of the Court, the case law supports the position of the government on the first issue. In other words, the importations are within the tariff understanding of the term "diaries."

In *Fred Baumgarten v. United States*, 49 Cust. Ct. 275, Abstract No. 67150 (1962), the importation was described as follows:

The imported article, as represented by plaintiff's exhibit 1, is a plastic-covered book, approximately 4 1/4 by 7 3/8 inches in dimensions. Its first few pages contain, successively, the date "1961," the notation "Personal Memoranda," calendars for the years 1960, 1961, and 1962, and a few statistical tables. The following 20-odd pages contain spaces for addresses and telephone numbers, each page more or less set aside for each letter of the alphabet. The remaining portion of the book consists of ruled pages allocated to the days of the year and the hours of the day and each headed with calendars for the current and following months. A blank-lined page, inserted at the end of each month's section, is captioned "Notes."

The court held that the distinguishing feature of a diary was "its suitability for the receipt of daily notations" and found that "[b]y virtue of the allocation of spaces for hourly entries during the course of each day of the year, the books are designed for that very purpose." It should be noted that the presence of pages for addresses and telephone numbers did not affect the court's conclusion in that case.

In *Brooks Bros. v. United States*, 68 Cust. Ct. 91, C.D. 4342 (1972) the court had before it an importation called the Economist Diary, a spiral bound book offered and sold as a diary with "more blank pages, used for recording events and appointments, than there are pages containing information." The court found that the diary portion was the essential or indispensable part of the importation and was therefore controlling of its classification.

In *Charles Scribner's Sons v. United States*, 6 CIT 168, 574 F. Supp. 1058 (1983) the court overturned the classification of a product as a diary under Item 256.56 of the Tariff Schedules of the United States ("TSUS") in favor of classification as a calendar under Item 274.10. The article in question consisted of a book described as an engagement calendar for the year 1979. The book consisted of photographs, each photograph occupying one page and facing another page on which a calendar was devoted to the seven days of a week. The book covered fifty-three weeks in all. The court found that the space allocated to daily notation was "minuscule, measuring approximately one-inch by 4 13/16 inches, and was intended for a notation of no more than a sentence or two." The court further found that the essential purpose of the book was to "convey high-quality Sierra Club photography in the form of a calendar."

The common thread in these cases is the understanding that "diaries" are articles whose principle purpose is to allow a person to make daily notations concerning events of importance. Articles may be diaries even if they contain supplementary material of a different type, such as useful printed information or addresses and telephone numbers. It can therefore be fairly concluded that tariff language adopted with knowledge of these judicial precedents maintains the understanding inherent in those decisions. *Central Products Co. v. United States*, 20 CIT 862, 936 F. Supp. 1002, 1006-7 (1996).

Plaintiff also argues that the diary provision in the HTSUS differs from prior tariff provisions sufficiently to make cases decided under earlier tariff laws inappli-

cable. Plaintiff points to the fact that the term "diary" in Item 256.56 of the TSUS was an eo nomine provision including all forms of a diary. Under the HTSUS, contends plaintiff, articles "similar" to a diary are "other" than diaries and have a separate provision in Subheading 4820.10.40.

This line of reasoning implies that articles with special features other than those purely dedicated to daily notation may be similar to diaries, but not actually diaries. This argument would be persuasive if it appeared that the provision for "other" articles similar to diaries would be empty or meaningless unless articles such as these came within its ambit. But the government points out that there exists a category of merchandise more remote from "pure" diaries than the importations but still sufficiently close to be called "similar." Thus, in HQ 955199 of January 24, 1994 (defendant's Exhibit P) the Customs Service issued binding classification rulings that a small diary-like book entitled "Special Occasion Book," devoted to making notes for "recording the name, date, occasion and gift idea for special dates" and a book called "Car Care Planner" devoted to the entry of information related to the maintenance of a car were similar to diaries and therefor came within the scope of "other" articles under Subheading 4820.10.40. They were not actually diaries, reasoned the ruling, because their usefulness was limited to special situations.

The rationale used in that ruling is persuasive and provides reassurance that the residual provision for "other" articles in Subheading 4820.10.40 need not be read as covering these importations out of concern that otherwise the subheading would cover nothing at all.

As is often the case, the exhibits are potent evidence. Examination of them leads the Court to conclude that the importations are forms of diaries rather than articles similar to diaries. Their use for notational purposes is not confined to a limited phase of human life or to a narrow area of activity. They are designed for notations concerning the full range of daily experience. As such, they fall within the meaning of the term "diaries" notwithstanding the fact that they contain supplementary material.

In the second stage of this dispute, the success of plaintiff's claim depends on whether or not the diaries are "bound" within the meaning of the subheading in which they were classified.

On this question the plaintiff argues that the meaning of "bound" ought to be derived from the permanent form of attachment demanded of books in *Overton & Co. v. United States*, 22 Treas. Dec. 437, T.D. 3237 (1912). That was a decision of the Board of General Appraisers in which General Appraiser Israel F. Fischer (later to be Chief Justice of the United States Customs Court in its first years) held that permanent binding was the distinction between a book and a booklet. In that decision it was held that small books for such purposes as the recording of weddings or the progress of a baby's growth were books under paragraph 416 of the Tariff Act of 1909 rather than booklets under paragraph 412 because they were "firmly and permanently stitched and bound small books, such as are the product of the bookbinders art."

In that case "booklets" were understood to be "an article used for greeting or souvenir purposes, sold and

dealt in by art dealers and stationers, and made up of several leaves or inserts flimsily fastened within a folder of paper or other material."

The Court is mindful of the salutary principle that a continuity of meaning should be maintained from one tariff act to another if Congress has not indicated otherwise. *Hemscheidt Corp. v. United States*, 72 F.3d 868 (Fed. Cir. 1995). However, it cannot be said that the *Overton* decision spoke to the general meaning of the term "bound" as it might be used in a statute. It simply decided that the distinction between a book and booklet lay in the relative permanence of the binding. This is not the sort of judicial decision that fixes statutory terminology so as to allow the court to reason that the legislators must have later used "bound" in the sense of articles that are irremovably joined to one another.

Nor can it be said that the later use of the term "bound" in the Tariff Schedules of the United States or the present HTSUS was so specifically linked to the field of book manufacture that specialized dictionary definitions of the term or bookbinding expertise ought to apply. The tariff provisions here under consideration cover a wide variety of book and non-book articles. Even those that are in book form are not the traditional books of the bookbinding trade. It follows that in these circumstances, the term "bound" should be given its common meaning rather than one associated with the trade of book manufacture. The common meaning of "bound" is fastened. The irrevocability of the fastening is not important so long as it goes beyond the transitory role of packaging.

For the reasons given above, it is the opinion of the Court that the importations at issue are bound diaries within the meaning of Subheading 4820.10.20 of the HTSUS. Consequently, defendant's motion for summary judgment will be granted.

ORDER

This matter is before the court on plaintiff's partial motion for summary judgment, and defendant's cross-motion for summary judgment regarding the tariff classification of imported loose-leaf books.

It is hereby ORDERED that defendant's cross-motion for summary judgment is granted and the action is hereby dismissed.

APPENDIX D

UNITED STATES CUSTOMS SERVICE
DEPARTMENT OF THE TREASURY

RE: Decision on Application for Further Review of Protest No. 4501-93-100016; classification of engagement book; organizer; day/week planner; agenda; dairy; not "similar to" a diary; 4820.10.2010, HTSUSA; Fred Baumgarten v. United States, 49 Cust. Ct. 275, Abs. 67150 (1962); Brooks Bros. v. United States, 68 Cust. Ct. 91, C.D. 4342 (1972); Charles Scribner's Sons v. United States, 574 F. Supp. 1058; 6 C.I.T. 168 (1983). HRL's 089960 (2/10/92); 952691 (1/11/93); 953172 (3/19/93); 953413 (3/29/93); 955253 (11/10/93); 955199 (1/24/94); 955636 (4/6/94); 955637 (4/6/94); 955516 (4/8/94).

CLA-2 CO:R:C:T 955937
October 21, 1994

CATEGORY: Classification
TARIFF NO.: 4820.10.2010

District Director
U.S. Customs Service
4477 Woodson Road, Rm. 200
St Louis, MO 63134-3716

Dear Sir:

This is a decision on application for further review of a protest timely filed on March 26, 1993, by Sidney H. Kuflik of the law firm of Lamb & Lerch, on behalf of his

client, the Mead Corporation, against your decision regarding the classification of day/week planners, also referred to as organizers or agendas. Four entries of the subject merchandise were made at the port at Kansas City, Missouri, between the dates of September 3 and October 14, 1992. These entries were liquidated between December 28, 1992, and January 29, 1993.

Counsel for the importer raises two issues in his application for further review of protest number 4501-93-100016. Counsel contends that there has been a detrimental reliance by Mead on the duty-free classification of its day planners under subheading 4820.10.4000, HTSUSA. Reliance was based upon a series of three 1991 New York Ruling Letters (NYRL's). On August 18, 1993, this office issued Headquarters Ruling Letter (HRL) 953690, dealing with Mead's detrimental reliance claim. Counsel also raises substantive legal arguments pertaining to the validity of the classification of these articles under subheading 4820.10.2010, HTSUSA.

Since detrimental reliance is not a matter subject to protest, we will deal with the classification issues in this document and will respond directly to the District Director as to how HRL 953690 impacts the four entries currently at issue.

A supplemental submission relating to the classification of this merchandise was sent to this office by Mr. Kuflik on September 22, 1994.

FACTS:

The articles at issue are described as "day planners." The style numbers the subject of this protest are 47062, 47064, 47066, 47068, 47102, 47103, 47104, 47105, 47106, 47107, 47122, 47124, 47126, 47128, 47130, 47132, 47134, 47136, 47138, 47140, 47142, 47144, 47172, 47174, 47176, 47178 and 47180. Samples of style numbers 47062 and 47104 were submitted to this office along with generalized information about the day planners. Some of the day planners contain three-ring binders which are inserted into a pocket on the inside of the jacket cover. These articles contain calendar planners, daily planners, sections designated for address/telephone information, blank note pads, rulers, plastic business card holders and graph note pads.

Four entries of the subject merchandise were liquidated by Customs under subheading 4820.10.2010, HTSUSA, as bound diaries, dutiable at a rate of 4 percent ad valorem.

Protestant contends that the day planners are properly classifiable under subheading 4820.10.4000, HTSUSA, and entitled to duty free entry. In support of this contention, protestant states:

1) the day planners at issue are not diaries per se, but rather articles "similar to" diaries, and therefore classification is precluded from subheading 4820.10.20, HTSUSA; and

2) even if these articles are deemed to be diaries, they are not "bound" diaries and therefore classification is precluded from subheading 4820.10.20, HTSUSA.

ISSUES:

Whether the day planners are classifiable as diaries of subheading 4820.10.20, HTSUSA, or as articles similar to diaries under subheading 4820.10.40, HTSUSA? Whether the articles at issue are considered bound?

LAW AND ANALYSIS:

Classification of merchandise under the Harmonized Tariff Schedule of the United States Annotated (HTSUSA) is governed by the General Rules of Interpretation (GRI's). GRI 1 provides that classification shall be determined according to the terms of the headings and any relative section or chapter notes, taken in order. Merchandise that cannot be classified in accordance with GRI 1 is to be classified in accordance with subsequent GRI's.

I. ARE THE DAY PLANNERS CLASSIFIABLE AS "DIARIES" OR AS ARTICLES "SIMILAR TO" DIARIES?

The determinative issue is whether the subject merchandise is classifiable as bound "diaries" under subheading 4820.10.2010, HTSUSA, or as "similar to" diaries under subheading 4820.10.4000, HTSUSA. This issue has been addressed in several rulings by this office. See HRL's 089960 (2/10/92); 952691 (1/11/93); 953172 (3/19/93); 953413 (3/29/93); 955253 (11/10/93); 955199 (1/24/94); 955636 (4/6/94); 955637 (4/6/94); and 955516 (4/8/94). In these rulings this office has consistently determined that articles similar in design and/or function to the instant merchandise are classifiable as diaries. The rationale for this determination

was based on lexicographic sources, as well as extrinsic evidence of how these types of articles are treated in the trade and commerce of the United States.

In counsel's original memorandum of law in support of the Mead Corporations' protest, dated May 21, 1993, it is contended that "Customs Headquarters has at no time even remotely suggested that day planners are diaries per se." We disagree. In HRL 089960, this office unequivocally stated that "subheading 4820.10.2010, HTSUSA, provides for bound diaries and address books." The holding in that ruling determined the leather agenda then at issue to be classifiable under subheading 4820.10.2010, HTSUSA. In HRL 952691, issued to the Mead Corporation, Customs held that when the "Personal Day Planner" then at issue was examined "in light of Heading 4820, HTSUSA, the common dictionary definition of 'diary', and past Customs rulings, it appears that the item is classifiable as a bound diary . . . ." In HRL 953172, this office determined that the day planners then at issue "fall squarely within the dictionary definition of diary . . . ." This sentiment was also expressed in HRL 953413. We note that all these rulings were issued before the date of counsel's original submission of legal arguments to Customs.

In all of the rulings cited supra, Customs held that articles synonymously referred to as diaries, planners, agendas, organizers and engagement books, most of which incorporated the same or similar components as the subject merchandise (i.e., day/week planners, address/telephone sections, blank sections for notes), fit squarely within the definition of "diary" as set forth in

the Compact Edition of the Oxford English Dictionary, 1987. That definition reads:

> 2. A book prepared for keeping a daily record, or having spaces with printed dates for daily memoranda and jottings; also applied to calendars containing daily memoranda on matters of importance to people generally or to members of a particular profession, occupation, or pursuit.

In counsel's supplementary submission to this office, dated September 22, 1994, it is argued that Customs should base its classification of the subject merchandise solely on the first definition of "diary" presented in the Oxford English Dictionary, which reads:

> 1. A daily record of events or transactions, a journal, specially, a daily record of matters affecting the writer personally, or which come under his personal observation.

In response to this claim, we wish to stress two points. First, Customs is not obligated to limit its reliance on lexicographic sources to the first definition presented for a given word. Reference to lexicographic sources is a means to ascertain the commonly accepted definition or definitions, for a word or term. It broadens our understanding of a word so as to arrive at a more accurate classification. Many words have several definitions and Customs may consider any or all of them when making a classification determination. Second, we note that the narrower definition of "diary," as set forth in the Oxford English Dictionary's first definition, connotes an article containing blank pages used to record extensive notations of one's daily activities. This is not the sole format for a diary. The word

"diary" also connotes a more formal and comprehensive approach to record-keeping.

The broader concept of diary includes those articles classified in HRL's 955636 and 955637, both dated April 6, 1994. In those rulings Customs determined that the classification of day planners as diaries reflects the common and commercial identity of these items in the marketplace. In HRL 955636, Customs classified day planners that were similar in function to the articles currently at issue. The covers of the day planners classified in HRL 955636 were conspicuously and indelibly printed with the legend "1994 Desk Diary." As we noted in that ruling, it stands to reason that the publisher would not have gone to the added expense of printing "1994 Desk Diary" on these articles' covers, nor risked alienating potential customers, if the articles were not indeed recognized as diaries in the marketplace. The fact remains that these articles must be considered a recognized form of diary if a manufacturer in the industry labels the articles as such and purposely presents them in such a manner to the consumer. This fact is pertinent in the instant analysis because the articles marketed as diaries in HRL 955636 and the Mead planners at issue are similar in material respects; both articles contain day and week planners with spaces to record appointments and various notations, sections for address and telephone numbers and blank sections for notes. As the overall design and function of the HRL 955636 diaries and the Mead planners are the same, and the former are marketed to consumers as diaries and recognized in the trade as such, it is reasonable to conclude that the Mead planners are similarly deemed to be diaries in the trade and commerce of the United States.

Further evidence that day planners are treated as a form of diary in the trade and commerce of the United States is provided by current advertisements run in The New Yorker magazine. The New Yorker regularly displays full-page advertisements for its "1994 New Yorker Desk Diary." The diary depicted in the advertisement appears to have a similar function to the planners under review. The advertisement's copy reads: "Since you depend on a diary every day of the year, pick the one that's perfect for you . . . Recognize what's important to you: a week at a glance, a ribbon marker, lie flat binding (spiral), lots of space to write."

In counsel's supplementary submission it is argued that the "1994 New Yorker Desk Diary" differs from the Mead planners at issue. Counsel contends that the New Yorker Desk Diary warrants classification as a diary in that its address book and note pad section are "relatively minor and incidental elements," and that these components comprise less than 10 percent of the diary's volume. Counsel submits that the Mead planner is different in that it is not marketed specifically as a diary, the address book and note pad components are refillable, the "non-diary" components cost more than the diary features, and "the day planner's essential character is no longer exclusively derived from its diary function."

We address counsel's arguments in the order set forth above. First, an examination of the New Yorker Diary reveals that it contains far more extraneous information and components than merely an address book and note book, yet it still primarily functions as a diary. As is discussed later in this ruling, this is the standard that the Court of International Trade used to determine

whether an article was classifiable as a dairy. Second, the fact that the New Yorker Diary is labeled and marketed as a diary is persuasive evidence of the article's identity; however, the mere fact that an article is not specifically labeled a diary does not preclude it from classification as such. Third, we see no relevance in the fact that the components in the Mead planners are refillable. Counsel argues that the ability to replace components is "strong indicia that the features are not merely complementary to the diary portion of the day planner . . . ." We do not agree. The fact that certain components are refillable may indicate only that the outer cover of the diary is expensive and durable enough so as to warrant use for several years, thereby necessitating refillable paper inserts. Lastly, the fact that the extraneous components in the Mead planners cost more than the pages to be used for written notations is irrelevant. The relative cost of components is not pertinent to classification in situations where we have a court-imposed standard which requires that a dairy's distinguishing feature be its suitability for the receipt of daily notations. See Fred Baumgarten v. United States, 49 Cust. Ct. 275, Abs. 67150 (1962). Paper inserts will invariably be the least expensive components of a diary. In many instances, the cost of the outer cover will be the most expensive component, and yet the article will be classified as a diary, and not as a binder, so long as it primarily functions as a site for the daily recordation of notes and appointments.

The Court of International Trade has spoken to the issue of what constitutes a diary for classification purposes. In Fred Baumgarten v. United States, the court dealt with the classification of a plastic-covered book which was similar in overall function to the articles

currently under review. In Baumgarten, the court determined the correct classification of an article which measured approximately 4-1/4 inches by 7-3/8 inches and contained pages for "Personal Memoranda," calendars for the years 1960-1962, statistical tables, and 20-odd pages set aside for telephone numbers and addresses. The majority of the book consisted of ruled pages allocated to the days of the year and the hours of the day. A blank lined page, inserted at the end of each month's section, was captioned "Notes." The court held that this article was properly classified by Customs under item 256.56, Tariff Schedules of the United States, which provided for "Blank books, bound: diaries," at a duty rate of 20 percent ad valorem. In that ruling, the court held: "the particular distinguishing feature of a diary is its suitability for the receipt of daily notations; and in this respect, the books here in issue are well described. By virtue of the allocation of spaces for hourly entries during the course of each day of the year, the books are designed for that very purpose. That the daily events to be chronicled may also include scheduled appointments would not detract from their general character as appropriate volumes for the recording of daily memoranda." emphasis added

The Baumgarten Court's analysis and holding, if applied to the merchandise at issue, yields a similar finding: the articles at issue are properly classifiable as bound diaries of subheading 4820.10.2010, HTSUSA, inasmuch as their distinguishing feature is their suitability for the receipt of daily notations. As with the articles at issue in Baumgarten, the Mead day planners contain allocated spaces for daily and hourly entries. Moreover, these diaries contain even more available writing space than did the articles deemed to

be diaries in Baumgarten, arguably rendering the subject merchandise even more suitable for "the receipt of daily notations."

As stated supra, the court in Baumgarten determined that the distinguishing feature of a diary is its suitability for the receipt of daily notations. The merchandise at issue, as is the case with most articles described as planners, organizers, agendas, engagement books, etc., contains information pages or interior components such as card holders, rulers and the like, which do not directly relate to the function of receiving written notations. The issue of whether the presence of extraneous material (i.e., weights and measure charts, conversion charts, "Year-at-a-Glance" calendars, maps, telephone area codes, rulers, card holders, etc. . . .) precludes classification as a diary was discussed in Brooks Bros. v. United States, 68 Cust. Ct. 91, C.D. 4342 (1972). In that case, the court dealt with the proper classification of an article described as "The Economist Diary." The plaintiff in Brooks Bros. argued that although "The Economist Diary" was in part a diary, it contained many pages useful solely for the information presented and therefore was not classifiable as a bound diary, but rather as a book consisting of printed matter or, in the alternative, a bound blank book. The court noted: Notwithstanding plaintiff's efforts to demonstrate that the Economist Diary is not a diary but a 'book of facts,' an examination of the diary reveals that there are more blank pages, used for recording events and appointments, than there are pages containing information . . . . The article is a diary which contains certain informational material in order to render it more useful to the particular class of buyers it seeks to attract. It is to be noted that the

exhibits introduced at the trial, that are conceded to be 'diaries,' also contain 'informational material,' . . . This additional material admittedly does not change their essential character as 'diaries." emphasis added

The Brooks Bros. Court concluded that "The Economist Diary" was properly classified by Customs as a diary and that this conclusion was "strengthened by the fundamental principle of customs law that an eo nomine designation of an article without limitation includes all forms of that article." As subheading 4820.10.2010, HTSUSA, eo nomine provides for bound diaries, and the articles at issue fit the Oxford English Dictionary's definition of diary, and are similar in function to the articles the courts in Baumgarten and Brooks Bros. found to be bound diaries, this office is of the opinion that the subject merchandise is properly classifiable as bound diaries under this subheading.

We think it imperative to recognize that there are many forms of "diaries." They may have outer covers of plastic, leather, paper or textile material. They may contain an array of components such as rulers, business card holders, pens, pencils, calculators and assorted inserts that are used either for providing information or as a means of recording specific types of information (i.e., sections for fax numbers, car maintenance information, personal finance data, etc. . . .). As the court in Brooks Bros. noted, citing Hancock Gross, Inc. v. United States, 64 Cust. Ct. 97, C.D. 3965 (1970), "The primary design and function of an article controls its classification." Hence, the determinative criteria as to whether these types of articles are deemed "diaries" for classification purposes is whether they are primarily

designed for use as, or primarily function as, articles for the receipt of daily notations, events and appointments.

In counsel's supplementary submission to this office, it is argued that in light of a recent court decision, Nestle Refrigerated Food Company v. United States, Slip. Op. 94-118 (CIT, July 20, 1994), Customs should rethink its approach to the classification of diaries which contain extraneous components unrelated to the recordation of daily notes and appointments. In Nestle, the court dealt with the issue of whether a canned tomato product containing other ingredients was classifiable as "tomatoes, whole or in the piece," as "preparation for sauce," or as "tomato sauce." Counsel submits that the analysis required of the court in Nestle closely mirrors the situation in the instant case in that we must determine whether the subject articles, by virtue of their added extraneous elements, cease to be diaries and have become articles "similar to" diaries. Specifically, counsel argues that the presence of the zipper pouch, ruler, business card holder, address book and note pad serve to remove the Mead planners from the realm of "diary" and render them "similar to" diaries. Counsel states that these features are not "complementary to the diary definitional base" and "alter the essence of the article so that the day planners' essential character is no longer exclusively derived from its diary function."

There are several problems with this analogy. First, the court in Nestle merely acknowledged that optional ingredients "must serve to complement, highlight, and not overwhelm, the essential character of the tomatoes." The court further noted that, "When too much of an optional ingredient or a combination of optional

ingredients are added to tomatoes . . . the tomato component is materially altered" and "the product can no longer be deemed to be just tomatoes." The Nestle Court focused on an article's "essence." The Brooks Bros. Court found an article's "primary design and function" to be determinative of classification. These analyses are similar in the sense that if an article is primarily designed as, and functions as, a diary, it stands to reason that it will be the diary component which imparts the article's "essence."

This office is of the opinion that the Brooks Bros. Court has explicitely set forth the standard we are to apply when dealing with diaries containing extraneous components. In that case the court recognized: "The fact that the Economist Diary contained a significant quantity of printed material did not change its essential character . . . Regardless of the incidental value or utility of its informational material, it was still primarily and essentially a diary . . . the informational material contained in the Economist Diary merely rendered it more useful and attractive to a particular class of purchasers . . . Without the diary portion, it could not be sold as a diary of any kind." emphasis added

We disagree with counsel's position that, pursuant to the analysis set forth in Nestle, a diary's essence must be imparted "exclusively" from its diary components to warrant classification in subheading 4820.10.2010, HTSUSA. Rather, we believe it is the Brooks Bros. analysis which is applicable in this instance: regardless of the presence of extraneous components, so long as the article is primarily a place for the recordation of events and appointments, it is

classifiable as a diary. It is this office's opinion that the Mead planners at issue have been primarily designed to perform a diary function.

Lastly, we note that the decision rendered in Charles Scribner's Sons, Inc. v. United States, 574 F. Supp. 1058; C.I.T. 168 (1983), is not precedential in the instant case in that the article at issue in that case is significantly different than the articles currently the subject of this protest. At issue in Scribner's was whether an article described as the "Engagement Calendar 1979" was a calendar or a diary for classification purposes under the TSUSA. The article under consideration in that case was described as a spiral-bound desk calendar with high-quality Sierra Club photographs featured on the left side of the opened calendar, and a table of days of the week on the right side. The article measured approximately 9-3/8 inches by 6-1/2 inches and the space allotted for each day of the week measured approximately one inch by 4-13/16 inches. The article was made of titanium-coated paper which was specifically chosen because it was best-suited for photographic reproduction. Plaintiff's witness in that case testified that although Charles Scribner's Sons, Inc. had received numerous complaints that the paper was not well-suited for writing, the plaintiff chose not to change the paper because the primary objective was to accentuate the photographs. Another witness for the plaintiff testified that the desk calendar had been marketed throughout the country as a calendar "because it was not suitable as a diary." The suitability determination, or lack thereof, was based on the quality of paper used (as stated, it was not appropriate paper for the receipt of written notations) and the quantity of writing space available. All of the factors which

precluded the article in Scribner's from classification as a diary are absent in the instant case. The type of paper used in these articles is well-suited for writing and the amount of space allocated for the recordation of notes, events and appointments is presumably adequate inasmuch as it is at least as great as that provided for in the articles held to be diaries in both Baumgarten and Brooks Bros..

The court in Scribner's stated that as the courts in Baumgarten and Brooks Bros. did not "distinguish between a diary and a calendar . . . they do not govern the result in the present case." Similarly, this office is of the opinion that as the issue in Scribner's was whether an article was a calendar or a diary, and the issue in the present case is whether the articles are diaries or "similar to" diaries, Scribner's is not precedential in this instance. The courts' decisions in Baumgarten and Brcoks Bros. are pertinent to our determination because those cases focused on the specific issue of what constitutes a diary for tariff classification purposes. Moreover, the articles determined to be diaries in those two cases bear a strong resemblance in both form and function to the merchandise currently under review.

Based on the Mead planners' suitability for the receipt of daily notations, lexicographic sources, treatment of planners in the trade and commerce of the United States, and prior treatment of similar articles by the Court of International Trade, the subject planners are deemed to be "diaries" for tariff classifica tion purposes, and classifiable under subheading 4820.10.2010, HTSUSA.

II. ARE THE ARTICLES AT ISSUE "BOUND" FOR PURPOSES OF CLASSIFICATION UNDER 4820.10.2010, HTSUSA?

The second issue before us is whether the day planners at issue are considered "bound" for purposes of classification within subheading 4820.10.2010, HTSUSA. In counsel's supplementary submission to this office, the argument is made that the Mead planners at issue are not "bound" for purposes of classification under subheading 4820.10.2010, HTSUSA, inasmuch as they do not meet the definition of a "bound book" as set forth in Kessler & Co. v. United States, 63 Cust. Ct. 513, C.D. 3944 (1969), citing Overton & Co. v. United States, 22 Treas. Dec. 437, T.D. 32327 (1912).

In Overton, the court defined a bound book as a "collection of leaves of any size permanently stitched or bound together in a cover, the binding being of the kind of work performed by the bookbinder." Counsel submits numerous other lexicographic definitions from both general and trade dictionaries which provide similar definitions of "bookbinding," and thereby arrives at the conclusion that the Mead planners at issue are not bound in the sense contemplated by the bookbinding trade. We note that all the submitted definitions set forth what constitutes a bound book. The issue at hand, however, is whether diaries with metal looseleaf binders, or spiral binders, are considered bound diaries for tariff classification purposes. The issue is not what constitutes a bound book, and there is no requirement that a diary be in the format of a book.

The Harmonized Commodity Description and Coding System Explanatory Notes (EN) to heading 4820, page 687, which represent the official interpretation of the HTS at the international level, state: "goods of this heading may be bound with materials other than paper (e.g., leather, plastics or textile material) and have reinforcements or fittings of metal, plastics, etc."

It is clear that the Harmonized System Committee contemplated metal binders as being within this heading's definition of bound articles.

Counsel contends that as the term "bound" is found for the first time at the eight digit level (it modifies the term "diary" in subheading 4820.10.20, HTSUSA), and the EN represent the official interpretation of the HTS only at the four and six digit level, the EN provide no instruction as to the meaning of the word "bound." While we concur that the EN need not be applied at the eight digit level, we disagree that the EN are of "no value" in this instance. The value of the EN is that they provide guidance and insight into the intent of the Harmonized System Committee when drafting the Nomenclature. In this case, the EN specifically set forth how articles of heading 4820, HTSUSA, may be bound. The EN state that articles of this heading may be bound with metal. This office interprets this language as indicative of the drafters' intent to include as bound any articles possessing ring binders or spiral binders. This position is in accordance with the courts holding in Brooks Bros., in which an article constructed with a spiral binding was classified as a bound dairy under item 256.56, Tariff Schedules of the United States Annotated (TSUSA).

We further note that the manner in which items 256.56 and 256.58 were drafted under the TSUSA supports our position that the term "bound" was intended to include ring binders and spiral binders. Items 256.56 and 256.58 TSUSA, provide for:

Blank books, bound:

256.56 Diaries, notebooks and address books: 4%

256.58 Other: .....Free

If this office were to adopt counsel's contention, that only books bound in the traditional bookbinding method (i.e., with stitching and glue) were to be deemed "bound," there would be no place in item 256, TSUSA, for diaries bound with ring binders and spiral binders as both the "diary" breakout and the "other" breakout are modified by the term "bound." This situation differs from the current construction of the HTSUSA, where subheading 4820.10.20 provides for bound diaries and 4820.10.40 is the provision where unbound diaries would be classified.

Lastly, we note that a semantical approach to this issue is revealing: a binder, whether a ring binder or spiral, is that which binds pages together in a fixed order. Pages held together in this manner are bound, and the diary is therefore deemed a bound article.

HOLDING:

The Mead Corporation day planners, referenced style numbers 47062, 47064, 47066, 47068, 47102, 47103, 47104, 47105, 47106, 47107, 47122, 47124, 47126, 47128,

47130, 47132, 47134, 47136, 47138, 47140, 47142, 47144, 47172, 47174, 47176, 47178 and 47180, are classifiable under subheading 4820.10.2010, HTSUSA, which provides for, inter alia, bound diaries and address books, dutiable at a rate of 4 percent ad valorem.

Since the classification indicated above is the same as the classification under which the subject entries were liquidated, you are instructed to deny the protest in full.

A copy of this decision should be attached to the Form 19 and provided to the protestant as part of the notice of action on the protest. In accordance with Section 3A(11)(b) of Customs Directive 099 3550-065, dated August 4, 1993, Subject: Revised Protest Directive, this decision should be mailed by your office to the protestant no later than 60 days from the date of this letter. Any reliquidation of the entry in accordance with this decision must be accomplished prior to the mailing of the decision.

Sixty days from the date of this decision, the Office of Regulations and Rulings will take steps to make the decision available to Customs personnel via the Customs Rulings Module in ACS and to the public via the Diskette Subscription Service, Freedom of Information Act and other public access channels.

Sincerely,

John Durant, Director
Commercial Rulings